

## ADVISORY OPINION NO. 94-1

A state employee requested an advisory opinion from the State Ethics Commission concerning the charter of a boat. The employee's agency was working on a large project. The project was made up of a number of smaller projects. The employee and his supervisor were working on one of the component projects. Work on this component project would require the use of a boat. Another employee of the agency would be working on a second component project. Work on the second component would also require the use of a boat. Both the supervisor and the employee working on the second component wanted to charter a boat owned by the employee.

The employee's supervisor explained that his portion of the project would require boat trips one to three times per week over at least an eighteen month period. Because the project was on a fixed schedule, the boat trips had to take place in all but the most severe weather conditions. The boat had to be available on twenty-four hours notice.

The supervisor also explained that the boat had to meet certain minimum requirements. It needed certain equipment. It also had to possess certain features to ensure seaworthiness. The boat also needed an operator who was familiar with the area in which the boat would be operating and was also familiar with the agency's diving regulations. The employee in charge of the other component project said that he needed a boat that met these requirements as well.

The project received funding from a federal source. The federal government restricted the use of these funds. The funds could not be used to purchase a boat although they could be used to charter a boat. Prior to receiving funding, the supervisor obtained estimates of charter boat fees and availability from various charter boat companies. The supervisor telephoned these companies and received their estimates. Their prices ranged from \$350-\$550 per day plus fuel costs. None of the charter companies could meet the availability requirements.

The employee had earlier purchased a twenty-three foot long boat. He purchased the boat for use in a private matter. The boat met all of the requirements set forth by the supervisor for use in the project. The boat was inspected by the agency and approved for use in agency projects. The employee offered to charter the boat to his supervisor for use in the project for \$299 per day plus fuel. The employee would captain the boat. It is not clear whether the employee knew about the estimates from the charter companies when he made the offer. The employee explained that he did not base his charter fee on these estimates. He based his fee on the amount that he was charged when he chartered a boat some time ago for another project.

The employee's situation raised a number of issues under Hawaii Revised Statutes (HRS) chapter 84, the state ethics code. The first of these concerned conflicts of interests. In relevant part, HRS section 84-14(a) reads:

§84-14 Conflicts of interests. (a) No employee shall take any official action directly affecting:

- (1) A business or other undertaking in which he has a substantial financial interest....

The term "official action" is defined by the ethics code as a "decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." Thus, section 84-14(a) would forbid the employee from taking any discretionary action affecting the charter of his own boat.

It was not clear whether the employee had taken any action affecting the charter of his boat. However, the Commission believed that if his supervisor did seek to charter the boat, then opportunities to take such action could arise. For example, the employee could be asked to work

on the proposal to charter his own boat. Pursuant to HRS section 84-14(a), he would have to disqualify himself from taking this action.

The second relevant section of the ethics code was the fair treatment section. HRS section 84-13 reads:

§84-13 Fair treatment. No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others; including but not limited to the following:

- (1) Seeking other employment or contract for services for oneself by the use or attempted use of the legislator's or employee's office or position.
- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the legislator's or employee's official duties or responsibilities except as provided by law.
- (3) Using state time, equipment, or other facilities for private business purposes.
- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or with a person or business whom the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

In general, HRS section 84-13 prohibits a state employee from using his official position to grant himself or anyone else an unwarranted benefit. For example, if the employee's boat was chartered simply because the owner of the boat was an agency employee, then this could be construed as an unwarranted advantage to the employee.

HRS section 84-13(2) refers to double compensation. This section prohibits a state employee from accepting compensation for performing his state duties except as provided by law. The charter fee that the employee proposed included an amount that would compensate him for acting as captain of the boat. If, in his role as an agency employee, his duties included serving as the captain of a boat, then he could not accept compensation outside of his state salary for performing this work. Both the employee and his supervisor informed the Commission, however, that the employee would not be called upon to captain a boat or to provide any crew services. The cost of chartering any boat includes captain and crew services. Because his state duties did not include serving as a captain, HRS section 84-13(2) would not forbid the employee from being privately compensated to perform this service.

The Commission noted that HRS section 84-13(4) was particularly relevant. This section forbids a state employee from engaging in a substantial financial transaction with a subordinate or with a person or business that the employee supervises or inspects. HRS section 84-13(4) would therefore seem to forbid the supervisor from negotiating the terms of the boat charter with the employee and from entering into an agreement to charter his subordinate's boat. The employee and his supervisor both said, however, that the supervisor need not participate in the chartering of the boat. The employee explained that another agency employee had responsibility over the entire project. This person did not supervise the employee. It would be possible for this person to charter the boat rather than the supervisor.

The final section of the ethics code that the employee was made aware of concerned confidential information. HRS section 84-12 reads:

§84-12 Confidential information. No legislator or employee shall disclose information which by law or practice is not available to the public and which the legislator or employee acquires in the course of the legislator's or employee's official duties, or use the information for the legislator's or employee's personal gain or for the benefit of anyone.

Confidential information is defined as information that is not available to the public. Section 84-12 forbids the disclosure of this information and also forbids its use for the employee's personal gain or for the benefit of anyone. The Commission believed that the employee may have been aware of the charter fee estimates that his supervisor had received over the telephone. The supervisor said that this information was available to anyone who asked the companies for their charter rates. Nonetheless, because the companies were asked for an estimate for a specific project, this information could be considered confidential. Section 84-12 required the employee to refrain from using or disclosing any confidential state information.

At the time that the employee asked for an opinion, his supervisor had already received estimates for the charter of a boat and had submitted a proposal to charter the employee's boat. To some extent, it appeared that the employee participated in the search for a boat. Because his participation may have tainted the search process, the Commission suggested that the process be redone. The employee was aware of the estimated charter fees of the boat charter companies. This knowledge could give the employee an unwarranted benefit. HRS section 84-13 forbids a state employee from using his state position to grant himself an unwarranted benefit. The Commission believed that, in order to avoid the possibility of an unwarranted benefit, the supervisor should inform the boat charter companies of the employee's estimate. The supervisor said that he would be willing to put the charter boat requirements out for bid. The Commission advised that he do this in order to avoid any appearance that the employee had been granted preferential treatment.

Pursuant to HRS section 84-14(a), the employee was advised to not take part in the search process. He had to disqualify himself from taking any discretionary action affecting the charter of his own boat. Section 84-13(4) also placed restrictions on him. If the employee won the contract, then his supervisor could not negotiate with him. The employee could negotiate the charter of his boat with a person who was not his supervisor.

The Commission advised that the employee also keep section 84-13(2) in mind. This section would forbid the employee from receiving private compensation for performing his state duties. He had to take care to keep his private role separate from his role as a state employee.

The Commission thanked the employee for his cooperation in this matter. With the employee's consent, copies of this opinion were sent to the employee's supervisor and the other employee who sought to charter the boat. The Commission reminded the employee that this advisory opinion only discussed the state ethics code and that the agency might have its own policies and rules concerning situations such as this.

Dated: Honolulu, Hawaii, March 10, 1994.

STATE ETHICS COMMISSION  
K. Koki Akamine, Vice Chairperson  
Sharon "Shay" Bintliff, Commissioner  
Don J. Daley, Commissioner

Note: Chairperson David K. Kaupu was present during the discussion and consideration of this opinion but was unavailable for signature. Commissioner Cynthia T. Alm disqualified herself from consideration of this matter.